Supreme Court, U. S.
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No. 80-21

In the Supreme Court of the United States

October Term, 1979

HEART MINISTRIES, INC.; VICTORY VILLAGE HOME FOR GIRLS; WILLIAM COWELL AND CAROL COWELL, AS DIRECTORS AND OPERATORS OF VICTORY VILLAGE HOME FOR GIRLS, AND AS INDIVIDUALS,
Appellants,

vs.

STATE OF KANSAS, EX REL., JOSEPH P. O'SULLIVAN, COUNTY ATTORNEY, RENO COUNTY, KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

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The Appellee has misinterpreted the issues before this Court, evidenced by its question presented on page 2 of its Motion to Dismiss or Affirm, to-wit:

> "Do the Kansas state statutes, as construed, which permit state regulation of group homes for children violate the First Amendment to the United States Constitution when the group homes are operated by religious institutions?"

The Appellants do not contend that the statutes and regulations are unconstitutional per se, but only as *applied to Appellants.* It is unlikely, but conceivable, that the Kansas statutes and regulations pertaining to children's homes would be compatible with every other religious organization or entity in the United States. This issue is presently not before this Court.

Appellee has misapplied the test as enunciated in *Wisconsin v. Yoder,* 406 U.S. 212 (1972):

> ". . . it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause",

and erroneously concluded that the regulations or statutes of Kansas meet those tests.

The first test in *Wisconsin v. Yoder* is whether the regulations interfere with the free exercise of Appellants' religious practices and beliefs. In the instant case involving this Appeal, the trial court answered in the affirmative, and this finding was not altered by the Kansas Supreme Court. The Supreme Court of Kansas, therefore, after concluding that Appellants' religious free exercises were being restricted, refused to balance the state interest and also refused to consider, as part of the second test, whether the interest of the state could otherwise be served by less restrictive alternatives. The Kansas Supreme Court improperly concluded that some of Appellants' practices, claimed to be religious, were secular. The effect of such ruling makes the Kansas Supreme Court the ultimate authority in deciding what is or what is not a religious activity.

The questions presented contained on pages I. and II. of the jurisdictional statement of this Appeal are the proper issues before this Court. While the fact of this case are very similar to *Roloff Evangelistic Enterprises, Inc., et al. v. State of Texas,* 556 S.W. 2d 856, appeal dismissed 439 U.S. 803, rehearing denied 439 U.S. 998 (1978), the case did not reach the Supreme Court in the same manner. Consequently, the issues raised therein have never been ruled upon and should now be ruled upon by this Court.

Appellants would respond to the alternate ground of the Motion to Dismiss or Affirm by stating that the Appeal was docketed within 90 days in accordance with the Rules of the Supreme Court of the United States. The Notice of Appeal was filed in accordance with 28 U.S.C. 2101(c). This not a direct appeal from a district court to the United States Supreme Court.

Appellants have substantially complied with the Appellate procedures, and respectfully urge that this Court deny the Motion of Appellee herein, and request an Order noting proper jurisdiction, or postponing consideration of jurisdiction to the hearing on the merits.

Respectfully submitted,

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